IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 159,

Plaintiff,

v.

MEMORANDUM AND ORDER
05-C-613-S

CIRCUIT ELECTRIC, L.L.C., TRINITY TECHNOLOGIES, L.L.C., PETER BUCHANAN, PATRICK McFALLS, and SCOTT BRAUN,

Defendants.

Plaintiff International Brotherhood of Electrical Workers Local Union 159 commenced this action to compel defendant Circuit Electric, L.L.C. to execute a collective bargaining agreement (CBA) with plaintiff as ordered by an arbitration award. Plaintiff also alleges that defendant Trinity Technologies, L.L.C. is bound by the arbitration agreement and the award because it is the alter ego or successor of defendant Circuit and that the individual defendants are liable for unpaid union wages under a veil piercing theory. Jurisdiction is based on the Labor Management Relations Act, 29 U.S.C. § 185, and 28 U.S.C. § 1331. The matter is presently before the Court on cross motions for summary judgment. The following facts are undisputed for purposes of the present motions.

FACTS

In 2001 defendant Peter Buchanan formed defendant Circuit to provide electrical contracting services. Circuit hired defendant Scott Braun to help with bookkeeping. Circuit specialized in wiring on cell towers and approximately ninety percent of its revenue was derived from cell tower work. In 2001 Buchanan approached plaintiff concerning an agreement to use its union members as employees. Circuit joined a multi-employer bargaining association (NECA) and signed three letters of assent with local IBEW unions representing different geographical areas where it conducted cell tower work.

Circuit had significant financial losses and cash flow problems in the first two quarters of 2004. The financial difficulties resulted from a variety of factors including Circuit's obligation to pay union wages. In September 2004 Braun married and asked his father-in-law, defendant Patrick McFalls for assistance. Circuit retained McFalls as a consultant to help improve the company.

On December 16, 2004 Buchanan, McFalls and Braun signed a memorandum of understanding (MOU) for the restructuring of Circuit. The MOU contemplated the creation of a new stand alone company, called NSAC. Under the MOU Buchannan would be Chief Operating Officer of both companies. McFalls would be president of Circuit and Vice president of NSAC. Braun would become Vice President of

Circuit and President of NSAC. Buchanan would own 65% of both companies, McFalls would own 25% and Braun would own 10%. The MOU contemplated that Circuit would continue to perform contracts in conformance with its union obligations and that NSAC would "focus exclusively on non-union contracts and labor operations."

On December 20, 2004 McFalls conducted a meeting of Circuit's employees where he informed them of the intent to create Trinity Technology L.L.C. On January 26, 2005 Trinity registered with the Wisconsin Secretary of State as a limited liability company. Trinity commenced operations in January 2005 using the same premises, office equipment and phone number used by Circuit. It paid no rent to Circuit until it entered a lease in July, 2005. Written bills of sale from Circuit to Trinity for office equipment were prepared in December 2005 indicating that the sales occurred in February 2005.

Trinity hired former Circuit employees in January 2005. It performed work on cell tower projects for which Circuit had contracts. Trinity used Circuit trucks, tools and materials to perform the work. In December, 2005 bills of sale were prepared showing sales of the trucks and tools in February, 2005. Trinity used Circuit inventory to perform the projects. In December, 2005 bills of sale for the inventory were prepared indicating an April sales date. Between January and October, 2005 Circuit transferred $180,000 cash from its bank account to a Trinity Account at the same bank.

In April, 2005 Trinity obtained a $750,000 line of credit which was secured in part by a pledge of Circuit's assets. The three individual defendants personally guaranteed the loan. In its application for the line of credit Trinity listed as its assets the Circuit inventory and vehicles discussed above. In an application for business insurance on behalf of Trinity, Braun listed Circuit's sales and accounts receivable history as its own.

In January 2005 Buchanan began bidding all new cell tower projects on behalf of Trinity. Trinity paid its employees $14.24 per hour. Circuit's CBA requires hourly wages of $26. In addition the CBA required fringe benefits costing approximately $15 per hour and a pension contribution of 24% of employee salary.

In March, 2005 Buchanan bid work for the FAA on an airport on behalf of Circuit because of its history, but asked that the contract be issued to Trinity. Buchanan used Circuit customers as references for the bid. Buchanan used Circuit's name to secure business for trinity. In one Trinity bid Braun advised that Trinity had been in business "4 years as Circuit Electric, since 1-4-05 as Trinity Technologies."

In 2005, 42% of Trinity's revenues came from former customers of Circuit. Trinity's management and business strategies and policies differ from those previously used by Circuit in significant ways.

Facts concerning the Union Contract

On December 20, 2004 Buchanan sent a letter to IBEW on behalf of Circuit notifying plaintiff that Circuit was withdrawing NECA's right to represent Circuit in union negotiations and would negotiate directly. The letter indicated that Circuit was exploring the creation of a new local and agreement. On December 23, 2004 Circuit Electric sent a letter to plaintiff providing in part:

> ... it will be necessary for us to completely reorganize and restructure the way in which Circuit Electric operates in the future.
>
> Therefore, Circuit Electric is submitting this letter as formal notification of termination of the Letter of Assent dated February 8, 2001, among Circuit Electric, Local 159 and NECA.
>
> Prior to the expiration of the existing Local Union #159 I.B.E.W. contract on May 31, 2005, Circuit Electric will be exploring the creation of a new local with the I.B.E.W. International Office to cover Circuit Electric LLC and its future endeavors.

On February 22, 2005 plaintiff sent defendant Buchanan a letter proposing changes to the bargaining agreement and suggesting the parties meet to negotiate. A letter soliciting negotiations was also sent from plaintiff to Buchanan on April 6, 2005. On April 14, 2005 McFalls and Braun sent a letter to plaintiff and the Council on Industrial Relations for the Electrical Contracting Industry (CIR) on Circuit letterhead advising that Circuit had

ceased operations, notifying plaintiff that Circuit was abrogating all IBEW contracts. On April 18, 2005 plaintiff sent a letter to Circuit advising that it believed Circuit had continuing obligations under its agreements and inviting Circuit to join arbitration before the CIR pursuant to the terms of the inside agreement. On April 21, 2005 McFalls sent an e-mail to plaintiff again advising that Circuit had ceased to exist.

On April 20, 2005 the CIR sent letters and forms to plaintiff and Circuit for the initiation of arbitration. On April 25, 2005 the CIR sent letters to plaintiff and Circuit advising that the proposed abrogation of existing agreements was treated as a contract change and was within CIR jurisdiction for adjudication. On April 27, 2005 plaintiff made its submission to the CIR proposing certain changes and incorrectly indicating that it was a joint submission with Circuit. The matter was scheduled for hearing on May 16, 2005.

On May 10, 2005 CIR sent Circuit a letter advising that it had reviewed Circuit's April correspondence and concluded that it had jurisdiction and that the case would be heard on May 16. On May 11, 2005 Circuit sent a letter to CIR signed by all individual defendants Advising that Circuit had ceased operations and that a new employer identification number had been issued to a newly formed Circuit, LLC. Circuit further objected to the improper indication that plaintiff's submission was bilateral and that

plaintiff had failed to timely serve it with its submissions. On May 11, 2005 Circuit sent an e-mail to CIR requesting withdrawal of the case from the CIR schedule. On May 12, 2005 the CIR sent a letter to Circuit affirming its jurisdiction, affirming the hearing and recommending that Circuit participate in person or by written submission. On May 13, 2005 Circuit sent an e-mail to CIR renewing its request to withdraw the matter from the CIR schedule. Circuit did not appear at the May 16 hearing before the CIR. On July 18, 2005 the CIR issued its decision directing the parties to sign and implement an attached Inside Agreement effective June 1, 2005.

MEMORANDUM

Plaintiff moves for summary judgment compelling Circuit to sign the collective bargaining agreement in compliance with the arbitration award and ruling that Trinity is subject to the agreement under alter ego or single employer theories. Defendants contend that the claim to compel execution of the new collective bargaining agreement is moot because Circuit has ceased to be an employer and that plaintiff's effort to impose Circuit's obligations on Trinity fail as a matter of law under either legal theory. Finally, the individual defendants contend that the facts could not support individual liability for the obligations of Circuit or Trinity under a veil piercing theory.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

Enforcement of the Arbitration Award

Defendants oppose plaintiff's attempts to enforce the arbitration award on two grounds. First, that the award was procedurally improper and substantively incorrect. Second, that enforcement of the award is moot because Circuit has ceased to exist or be an employer.

Concerning the first contention, defendants argue that plaintiff's submissions to the arbitrator were one day late and

that plaintiff improperly designated the submission as joint. Defendants further contend that the award was improper because Circuit was no longer an employer at the time of the award. Plaintiff disputes these positions factually and legally. However, regardless of whether the positions may have had merit before the CIR, they may not be raised in opposition to the present action to enforce the award. Defendants chose not to appear or submit materials for consideration at the hearing and they concede that they did not seek to vacate the award within the applicable ninety day limitations period.

> It is well settled, in this circuit at least, that failure to challenge an arbitration award within the applicable limitations period renders the award final. Thus, those challenges in the nature of grounds to vacate the award may not be asserted as defenses to a subsequent enforcement action.

International Union of Operating Engineers, Local 150, ALF-CIO v. Centor Contractors, Inc., 831 F.2d 1309, 1311 (7th Cir. 1987). Nor does it matter that defendants were unaware or misinformed about the right or time to appeal. Id. at 1312. It was their obligation to inform themselves and seek advice of counsel. Id. The award is final and subject to enforcement.

Defendants second argument is that the award has been mooted because Circuit has ceased to operate and there is no possibility that it will hire employees. While the Court finds no genuine dispute that Circuit will not hire employees, that fact does not

necessarily render enforcement moot. If Trinity is the alter ego of Circuit, it is equally bound by an arbitration award which was a part of the collective bargaining process. Id. at 1313. Accordingly, if Trinity is Circuit's alter ego, it will be obligated to execute the Inside Agreement in compliance with the arbitration award.

Attribution of Circuit Liability to Trinity

Two matters can be resolved at the outset. There is no entity called "Circuit II" which could be the alter ego of Circuit, and no claim based on the doctrine of successor liability is alleged or pursued against Trinity. The remaining issues are whether the facts require or permit a finding that Trinity is the alter ego of Circuit or whether Circuit and Trinity are a single employer.

The single employer and alter ego doctrines are closely related in that both are concerned with whether the relationship between two employer entities is such that they should be treated as the same for purposes of collective bargaining. See Id. at 1312-13; 1 N. Peter Lareau, Labor and Employment Law, § 14.02 (2005). However, "the single employer doctrine, in contrast to the successorship and alter ego doctrines, is used to determine whether two presently existing entities are in fact so related that they should be treated as one employer for purposes of collective bargaining." Centor Contractors, 831 F.2d at 1313, n. 2; Labor and

Employment Law, § 14.02[2][a]. The undisputed facts do not support a conclusion that Circuit and Trinity were simultaneously operating in any meaningful way. Rather, the two existed simultaneously only during a period where Circuit's assets, employees and business opportunities were being transferred to Trinity while Circuit was in the process of ending business operations. Under these circumstances, the appropriate analysis is that prescribed by the alter ego doctrine. Id.

Under the alter ego doctrine Circuit and Trinity are treated as a single, continuous employer if they have engaged in conduct which allowed them to gain an unearned advantage in labor activities simply by altering corporate form. Central States, Southeast and Southwest Areas Pension Fund v. Sloan, 902 F.2d 593, 596 (7th Cir. 1990)(Quoting NLRB v. Dane County Dairy, 795 F.2d 1313, 1321 (7th Cir. 1986)). Stated differently, the issue is whether Trinity is a disguised continuance of Circuit, established to avoid collective bargaining obligations. Id. Among the factors to be considered is whether one entity is the alter ego of another and whether the following are substantially identical between the entities: ownership, management, business purposes, equipment, type of customers, and operations. Id. An important factor in the analysis is whether the evidence supports the finding that the parties were motivated by the desire to avoid bargaining obligations. Id. at 1322.

Because there is conflicting evidence on a number of these factors, and particularly because the question of defendants' motivation to avoid union obligations in forming Trinity is subject to credibility assessment, the matter cannot be resolved on summary judgment. Several of the relevant factors are substantially identical. Equipment, inventory and facilities were transferred directly from Circuit to Trinity. Furthermore, existing customers were transferred and apparently most new Trinity customers were cell tower owners. There is some factual dispute concerning the exact nature of customers. Buchanan was principal owner of both entities, though minority ownership was subsequently shared by Braun and McFalls. Certain operational procedures and approaches differed between the two companies, but the significance of these changes is subject to dispute.

The greatest factual dispute centers on the element of motive. Specifically, whether the formation of Trinity was motivated by the desire to avoid union obligations or some other business advantage. Generally, the differences between the operations of Trinity and Circuit could have been readily accomplished without a change in business form. Certainly, the new procedures recommended by McFalls and the sharing of ownership interest could have been implemented within Circuit. Since the change of business form was not necessary for these purpose the inference seems to be that it was accomplished to achieve the only objective that could not have

been accomplished within Circuit--avoiding the collective bargaining agreement.

Defendants, however, present evidence of an elaborate plan which involved the creation of Circuit II and the alteration of business direction for both entities. While such a broad business plan might tend to show a business motive other than the avoidance of the union contract, the fact that these plans did not come to fruition and that in fact Trinity looks very much like Circuit tends to undermine this argument.

Additionally, there is some direct evidence of motive. At Buchanan's deposition the following exchange occurred:

> Q. Why did you not make any bids on behalf of Circuit Electric for cell tower work during January, February, March of 2005?
>
> A. Because the numbers had become so tight because it's a bad time of the year that I couldn't be competitive on them.
>
> Q. Was one reason why you couldn't be competitive the labor costs imposed by the contract?
>
> A. That was the only reason.

Buchanan deposition at p. 88. Certainly this testimony is further evidence that defendant's motive for the creating Trinity and transferring Circuit's assets, employees and customers to it was motivated by a desire to avoid the union bargaining and contract obligations.

A genuine issue of fact remains concerning the motivation of defendants in forming Trinity as well as the various other factors that affect the alter ego determination including the extent to which Trinity's operations differ from those of Circuit.

Corporate Veil Piercing

In order to disregard the liability shield that is central to the purpose of establishing a limited liability company and hold the individual defendants liable for the obligations of Circuit or Trinity, the following factors must be considered:

> 1) the amount of respect given to the separate identity of the corporation by the shareholders; 2) the fraudulent intent of the incorporators; and 3) the degree of injustice visited on the litigants by respecting the corporate entity.

Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 85 F.3d 1282, 1287 (7th Cir. 1996). Plaintiff has presented virtually no evidence which would suggest that the limited liability afforded the company defendants should be ignored.

The individual defendants generally observed corporate formalities concerning corporate and personal assets. The fact that individual defendants provided personal guarantees and loans to the companies in no way suggests a disregard of corporate formalities. The existence of such transactions tends to affirm

the separate existence and tends to benefit creditors of the corporation. Neither is there evidence of fraud with respect to company assets. It appears from the facts of record that all asset transfers from Circuit to Trinity were accounted for and that proceeds were used to satisfy Circuit's creditors. There is no evidence that any funds were improperly transferred to individual defendants. There is no evidence that the entities are undercapitalized shams.

Finally, there is no evidence that injustice will result if the company identity is respected. The evidence does not suggest that Trinity paid more than fair value for Circuit's assets or that the individual defendants improperly benefitted from the transaction or took a disproportionate share of cash as salary. Furthermore, there is no evidence that Trinity was not using all its resources to be as profitable as it could be. As a result, the Trinity assets available to satisfy any union contract obligations appear to be at least as great as those available in Circuit. Plaintiff has failed to bring forth evidence which could meet its burden even under the most favorable view.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED as it concerns the enforceability of the CIR order to enter a successor agreement and is in all other respects DENIED.

IT IS FURTHER ORDERED that the motion of defendants Circuit and Trinity for summary judgment is GRANTED as it concerns claims against "Circuit II" and claims based on the successor liability and single employer doctrines, and is in all other respects DENIED.

IT IS FURTHER ORDERED that the motions of defendants Buchanan, Braun and McFalls for summary judgment dismissing claims for personal liability based on veil piercing are GRANTED.

Entered this 10th day of March, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge